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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 266

THE STATE OF FLORIDA and THE UNITED STATES OF AMERICA,

Petitioners,

vs.

EMELWON, INC., a Florida Corporation, and KAIEL THOMPSON McALISTER,

Respondents.

BRIEF OF RESPONDENTS

AL J. CONE
CONE, WAGNER, NUGENT, JOHNSON, McKEOWN & DELL
507 North Olive Avenue
West Palm Beach, Florida 33402
Attorneys for Respondents

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, HArrison 1-3030

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BRIEF OF RESPONDENTS

STATEMENT OF THE FACTS

Respondents agree with Petitioners' statement of the facts.

QUESTION I

Whether Liability May Arise under the Federal Tort Claims Act upon a Theory of Absolute Liability for the Negligence of an Independent Contractor Engaged in Aerial Spraying Operations.

Respondents submit that the above question does not clearly set forth the issue and that it should be more appropriately stated as follows:

Whether the Adoption of the Rule of Non-Delegability to an Independent Contractor of the Duty to Use Due Care in Inherently Dangerous Activities Is in Conflict with the Dalehite Decision.

Petitioners' only argument under this question is that the non-delegable rule, in regard to the duty to use due care when carrying out an inherently dangerous activity, is not distinguishable from the rule of strict liability which this Court has condemned in Federal Tort Claims cases in *Dalehite* v. *United States*, 346 U.S. 15, 73 S.Ct. 956, 97 L.Ed. 1427 (1953).

It is submitted that the *Dalehite* decision is distinguishable from the present case. In *Dalehite* the alleged negligence, if any, was held to be at the discretionary level which, of course, does not subject the United States to tort liability. There was no evidence in *Dalehite* of any negligence other than at the discretionary level, and thus, for purposes of discussing liability under the Federal Tort Claims Act, there was no negligence present in the *Dalehite* case. Because of the lack of evidence of negligence, this Court held that the United States could not be held liable without fault.

The present case does not impose absolute liability without fault upon the United States. The next to last paragraph of the opinion presently on review makes it perfectly clear that there were two possible theories under which factual issues were present which rendered the direction of a verdict erroneous. 1) Whether United States employees breached the duty imposed on an employer who discovers a dangerous situation created by its independent contractor, or, 2) whether the United States breached a non-delegable duty to exercise reasonable care to prevent harm from an inherently dangerous activity carried out by an independent contractor. Under either theory actual

negligence would have to be proved in order for recovery to lie.

In *Hopson* v. *United States,* 136 F. Supp. 804 (D.C. Ark. 1956), the court distinguished the non-delegable rule from the strict liability condemned by the *Dalehite* case as follows:

> "The Court is of the opinion that the non-delegable rule is comparable to the respondeat superior rule and is not the type of absolute liability without fault which was condemned in the Dalehite case. Contra, Strangi v. United States, supra, at page 308 of 211 F.2d. Stated differently, the Dalehite case merely construes the Tort Claims Act to require 'a negligent act' and to be inapplicable to liability based solely upon 'ownership of an "inherently dangerous commodity" or property, or of engaging in an "extra hazardous" activity'. Dalehite v. United States, supra, at page 45 of 346 U.S., at page 972 of 73 S.Ct."

> "It would seem then that inasmuch as the non-delegable rule requires a negligent act on the part of an employee of an independent contractor, the rule would not be a type of absolute liability prohibited by the Dalehite case."

In *Hopson* it was held that the Plaintiff could not recover, however the above quoted language clearly explains the distinction between the non-delegable rule and absolute liability without fault.

An opinion of this Court which is more recent and more analogous to the present factual situation than *Dalehite* is *Hess* v. *United States,* 80 S.Ct. 341, 361 U.S. 314, 4 L.Ed. 2d 305 (1960). In that case an employee of an independent contractor was killed, and suit was instituted against the United States under the Federal Tort Claims Act. Oregon had an Employer's Liability Law which provided that owners, contractors, and sub-contractors shall

use every device practicable for safety. When the case was before this Court it was undisputed that the United States was not guilty of negligence which would make it liable under the wrongful death statute of Oregon, and the issue was whether the Employer's Liability Law could impose liability on the United States. This Court held that the Employer's Liability Law would be applicable even though the Plaintiff was an employee of an independent contractor. The *Hess* case makes it clear that liability may be imposed under the Federal Tort Claims Act even though there is an independent contractor involved, where under state law liability would be imposed on the party engaging the independent contractor.

In *Schmid* v. *United States,* 273 F.2d 172 (7th Cir. 1962), the United States had a contract with an independent contractor to repair a government building. The scaffolding used by the independent contractor was in a dangerous condition which caused an injury to an employee of the independent contractor. Illinois had a law entitled, "The Illinois Scaffold Act" which provided that the use of scaffolding was a highly dangerous activity, and that the owner of the premises had an independent, non-delegable duty to comply with this Act. The evidence revealed that the United States, in the exercise of reasonable care, should have been aware of the non-compliance with the Illinois Scaffold Act. It was held, under the Federal Tort Claims Act, that this was a non-delegable duty on behalf of the United States, and therefore, the United States was held liable to the employee, even though there was an independent contractor involved.

It is submitted that the opinion of the Court of Appeals does not conflict with the *Dalehite* decision, because in the present case there was evidence of negligence at the operational level of this inherently dangerous activity, and the

United States, under Florida Law, could not delegate the duty to use due care to an independent contractor in order to absolve itself of responsibility.

QUESTION II

Whether the United States, As the Employer of an Independent Contractor Engaged in Aerial Spraying Operations, Owes a Duty under the Federal Tort Claims Act to the Public at Large to Supervise Such Operations, Discover Dangerous Situations Posing Threat of Injuries to Others, and Require Precautions to Prevent Negligence in the Accomplishment of the Delegated Task.

Apparently the only contention of Petitioners under this question is that the present decision conflicts with *United States* v. *Page*, 350 F.2d 28 (10th Cir. 1965). That case is easily distinguishable from the present opinion, because in the *Page* case the injured party was an employee of the independent contractor guilty of negligence. The Court held that the non-delegable rule did not apply to injured employees of the independent contractor, and indeed that is the law in Florida. *Florida Power and Light Co.* v. *Price*, 170 So.2d 293 (Fla. 1964). Respondents concede that if they were employees of the independent contractor in the present case they could not recover against the United States.

QUESTION III

Whether the United States May Be Liable under the Federal Tort Claims Act As the Employer of an Independent Contractor Where the Independent Contractor Is a Sovereign State, Itself Immune from Suit in Tort.

Petitioners have cited no authorities whatsoever in support of this argument. The three cases cited on page 8 of the Petition are not in point in any manner whatsoever,

and indeed Respondent fails to see how they are at all relevant. Respondent would point out that there was a recovery for the Plaintiff in all three of the cases cited, and in none of the cases is there any language to the effect that the United States could not be held liable for the negligence of a state which is immune from suit.

Sovereign immunity plays no part in the present case, since the State of Florida is liable to indemnify the United States under a hold harmless agreement for any claims made against the United States arising out of the activities undertaken by the United States and the State of Florida.

CONCLUSION

Petitioners have not shown that the decision on review conflicts with any other cases. The Federal Tort Claims Act imposes liability on the United States ". . . in the same manner and to the same extent as a private individual under like circumstances" (28 U.S.C.A. § 2674). It is respectfully submitted that the Court of Appeals has done nothing more than apply the language of the Act in conjunction with the law of Florida and that the Petition for Certiorari should be denied.

AL J. CONE
LARRY KLEIN
CONE, WAGNER, NUGENT, JOHNSON, McKEOWN & DELL
507 North Olive Avenue
West Palm Beach, Florida 33402
Attorneys for Respondents